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IN THE

SUPREME COURT

OF THE UNITED STATES

RICHARD C. ROLES,

Petitioner

vs.

HUGH EARLE, COLLECTOR OF INTERNAL REVENUE for the DISTRICT OF OREGON, and THE UNITED STATES OF AMERICA,

Respondents

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI JURISDICTION

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The government's answering brief requires an answer to three questions:

1. Should plaintiff's claim be treated as two separate actions each against a different party consolidated for trial, or

2. Should plaintiff's claim be treated as two separate actions severed for trial, each claim against both defendants, or

3. Should plaintiff's claim be treated as one single action against two defendants?

QUESTION 1

SHOULD PLAINTIFF'S CAUSE BE TREATED AS TWO SEPARATE ACTIONS EACH AGAINST A DIFFERENT PARTY?

The government's brief states on page 7 and 8 as follows:

> *"The theory of taxpayer's single action against Collector Earle then in office, and the United States was that recovery could be had against the collector for so much of the taxes in question as had been paid to him, namely* $6253.81, *and against the United States of the balance of* $18,111.37 *which had been collected by the prior collector, Maloney. See Powell vs. U. S., wherein it was held that a collector and the United States may be joined in one action for the recovery of taxes, but that a separate judgment should be entered against each. In any event, petitioner's demand for a jury trial required a severance."*

Hence, according to the theory now adopted by the government, plaintiff's claim should be treated as two separate causes (although involving identical facts). (1) A claim against the collector for $6253.81 and (2) a claim against the United States for $18,111.37.

Petitioner contends to the contrary as will be later discussed, but assumes for this argument that this is correct.

It is fundamental that jurisdiction may not be stipulated between counsel, or conferred by any theory or act of a party. No authority need be cited for that proposition.

If the claim against the United States was void under the case of *Roseman v. United States,* 323 U. S. 658, for lack of jurisdiction, and as determined by the 9th Circuit, since the former collector had received the money but not collected the tax, then a dismissal of that cause for lack of jurisdiction should be without prejudice as to plaintiff.

If the two claims were not only severed for trial purposes but were in fact two separate claims against different parties ($6253.81 against Collec-

tor and $18,111.37 against the United States), then it should appear obvious that plaintiff's claim in the amount of $6253.81 against the collector could not have any bearing on plaintiff's claim of $18,111.37 as against the United States; and therefore, it is impossible to comprehend how an appeal from a cause where the claim was limited to $6253.81 could possibly allow the court to include $18,111.37 in a judgment where the demand was only for $6253.81.

We quote from the opinion

> *"Appellant's entire argument is bottomed upon the thesis that he should have judgment against the collector because no jurisdiction existed to sue the United States which amounts to a virtual abandonment of his appeal from his judgment dismissing the action as to the United States. Yet appellant endeavors to tie in the judgment of January 2, 1951 against the collector with the judgment of March 26, 1951 for the purpose of appeal without mentioning the January 2, 1951 judgment in his notice of appeal. Appellant assumes that his appeal from the order overruling his motion to set aside the March 26, 1951 and to enter judgment in his favor for the full amount of the claim against the collector brought the judgment of January 2, 1951 here for consideration. The appeal from the said order did not and could not serve such a purpose. The motion*

to amend the judgment of March 26, 1951 had no such force and effect as to cause the judgment of January 2, 1951 to merge with the March 26, 1951 judgment for purposes of appeal.

"While it may be fairly deduced from the attitude taken by appellant on his appeal that he has abandoned his contention that the trial court has jurisdiction to enter a judgment against the United States of America, and therefore we would perhaps be justified in affirming the March 26, 1951 judgment on that ground, however, because of the apparent confusion in the record, we deem it advisable to decide for ourselves the jurisdictional question which is before this Court by reason of the appeal from the March 26, 1951 judgment."

We now quote from page 10 of the government's answering brief:

> *"Thus in order for the petitioner to obtain on appeal the full relief which he sought by his motion, it was necessary for him to have appealed not only from the judgment entered in favor of the United States, but from the judgment against collector, Earle, as well."*

In other words, the government's position, and apparently the court's position, likewise, is that although these were two separate and distinct actions against different defendants in different amounts, yet by some method unknown to the law,

plaintiff could and should have appealed from a judgment in favor of plaintiff and against Collector Earle in order to bring before the appellate court an erroneous judgment against plaintiff and in favor of the United States on a different claim.

The only judgment that could have been rendered (adopting the government's theory of separate claims against different defendants) as to the claim of $18,111.37 was an order of dismissal for lack of jurisdiction as to the United States, and further directing that the findings of fact and conclusions of law be set aside and held for naught and the parties be restored to their former position in regard to that portion of the claim.

Under the theory of separate actions consolidated for trial, and particularly, where the government insists on the position that the action against the collector is personal, (See page 8 of answering brief.), there is no reason or rule of law requiring an appeal from an unconnected favorable judgment in order to bring before the appellate court an unfavorable ruling in favor of a different defendant.

QUESTION 2

SHOULD PLAINTIFF'S CLAIM BE TREATED AS TWO SEPARATE ACTIONS SEVERED FOR TRIAL, EACH CLAIM AGAINST BOTH DEFENDANTS?.

This is the theory which would be required by severance.

There can be no doubt that the plaintiff's claim, whether separated in two parts for trial or not, was dependent entirely on one set of facts requiring one determination.

The government claims a severance was made necessary by plaintiff's demand for a jury trial. (p 8 Government's brief.)

How could this be true when the Court has now held that the trial court did not have jurisdiction of any claims against the United States?

If a portion of plaintiff's claim was properly held to be a claim against the United States, then it is undisputed that the court could enter the findings, conclusions and judgment either in conformity with the jury verdict or to the contrary, since the statute deprives a plaintiff of a jury trial

in a claim against the United States for the recovery of taxes.

Conversely, however, if the plaintiff's entire claim was held to be a claim against the collector, (and it is now so held) then the trial would be entirely governed by plaintiff's demand for a trial by jury, and the court would be bound by the jury verdict, and no severance was either necessary or proper.

There is no room for dispute in that regard.

Question number one proceeds on the theory that there were two separate causes with separate and distinct defendants. (Plaintiff vs. Earle only for $6253.81 and Plaintiff vs. United States only for $18,111.37.)

Question number two, here discussed, proceeds on the theory of severance. The Circuit Court and counsel for the government have not distinguished between the two but are confusing and attempting to combine the two theories.

There can be no severance unless there was something to sever — in this case one cause of action severed into two causes of action. Where this

is done, it must be done by assuming that the two causes of action are brought by plaintiff against all of the defendants named in the action, thus (1) plaintiff v. Collector Earle and the United States as to $6253.81, and (2) plaintiff vs. Collector Earle and the United States as to $18,111.37.

If this is the correct treatment, then the judgment entered in first cause of action is not only correct but is a complete and correct determination of that claim in which collector Earle is held liable and defendant United States is discharged from liability and responsibility.

In the second cause of action, the Untied States is held responsible, but not liable because the judge did not agree with the jury, and collector Earle was discharged from liability and responsibility.

The second judgment therefore is a determination (although erroneous) that the United States and not Collector Earle is the responsible party.

When plaintiff has sued one of two joint defendants, only one of which is responsible, and the Court gives judgment in favor of the United States, and discharges the Collector while the proper holding is exactly the opposite; namely, that

the United States should be discharged of responsibility for lack of jurisdiction, and the Collector should be held liable, then certainly, an appeal from that judgment will bring before the appellate court the question of a proper judgment against whichever defendant is responsible.

The appellate court has apparently confused plaintiff's position regarding the appeal from the order overruling plaintiff's motion to set aside and for entry of the proper judgment.

This motion was necessary to bring the matter to the trial court's attention but is completely unnecessary to the proper determination under the theory of severance. The confusion resulted from the government's answering brief on appeal.

If the judgment entered on the severed cause was a judgment on a cause where both the United States and the Collector were parties, the appellate court could enter the proper judgment on appeal against the proper party to that appeal, and both defendants were named in plaintiff's Notice of Appeal (R. 70).

The appeal from the order on the motion to set aside whether appealable or not is unnecessary

to a proper determination of the appeal because the action against the Collector and the United States for $18,111.37 is a separate and complete cause and where all of the facts are undisputed and a jury verdict has been received, there is nothing to do but reverse with directions to enter judgment against the proper party, under this treatment of plaintiff's total claim.

QUESTION 3

SHOULD PLAINTIFF'S CLAIM BE TREATED AS ONE SINGLE ACTION AGAINST TWO DEFENDANTS?

Plaintiff-petitioner believes that this is the only proper treatment of plaintiff's claim.

The facts are identical as to all of the elements of plaintiff's claim; the amounts are undisputed; and plaintiff's claim is all against one party (defendant-collector Earle). While the government makes a mild attempt to question the validity of the Circuit Court's holding in the latter respect, that court's decision is well-supported by the holdings of this court.

Petitioner has shown that if the claim is to be treated as two separate claims, one against the col-

lector and one against the United States (Question 1) that the judgment in favor of plaintiff could have no bearing on the second, and an appeal from the first judgment would be improper and would bring nothing before the appellate court. Likewise, petitioner has shown that if the claim is to be treated as two separate claims each against the two defendants Collector and the United States, then it would not be necessary to appeal from the favorable judgment since both parties were before the court on appeal from the second judgment.

Hence, while plaintiff feels that there simply could not have been a severance since the court had no jurisdiction over a claim against the United States, still the appellate court had the parties and all of the facts before it under either the second or third theory and hence, should have entered the proper judgment in any event.

It seems more logical, however, to follow the court's opinion in *Moore Ice Cream Co. vs. Rose,* 289 US 373, and hold that plaintiff's entire cause of action was against the government through collector Earle, and there was not and could not be a severance, since even if the parties had intended

to stipulate to jurisdiction of the District Court over the claim against the United States, and indeed the plaintiff did not* that such stipulation was a nullity and no act of the parties could have conferred jurisdiction over the United States.

Jurisdiction may never be conferred by any voluntary or involuntary act of the parties.

Under *Moore Ice Cream Co. v. Rose* (supra), this court held that the distinction between the collector and the United States was purely fictional. We quote from that decision:

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*Note: The plaintiff at the time he filed his cause, as well as the government, had a question as to jurisdiction against the collector, and hence joined the United States as a party feeling that the jurisdictional question could be later resolved. The case of *Powell vs. U.S.* 123 F. 2d 472 has never been relied upon by petitioner, except for its holding as to Title 28, Section 1346.

When the matter came on for jury trial, Mr. Garland, representing the government, requested that the pre-trial order recite that as to the claim against the United States, it was agreed that it be tried by the court. Petitioner's counsel agreed that if any part of petitioner's claim was a claim against the United States, rather than the collector, that it would be tried by the court since the statute so required. Mr. Garland, counsel for the government, stated that he wanted the stipulation in the pre-trial order so that the government could not have been considered to have waived its right to trial by the court in the event the jurisdictional question should be argued.

This, of course, did not work a severance unless and until it was found to actually be a claim against the United States and not the Collector.

As a result of the jury trial, both the government and the plaintiff took no further steps to determine the jurisdictional question.

Mr. Winter representing the government at the time of the oral argument on a motion stated to the court:

> "*As your honor will recall we were going to raise a jurisdictional question. There was considerable doubt in the minds of both counsel for the government — and still is — and counsel for plaintiff as to the jurisdiction of the court in the matter, and there we entered into*

"A suit against the Collector who has collected a tax in fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he is guilty of no wrong, and though another is to pay; there may have been utility in such a device when the government was not suable as freely as now. They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting, he was acting in the line of duty, and in the line of duty he has turned the money over. In such circumstances, his presence as a defendant is merely a remedial expedient for bringing the government into court."

In view of that holding, the plaintiff in truth and in fact had only one single cause of action

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a stipulation. As I recall it was an oral stipulation to the effect that the evidence in both cases should be used by the court and considered as evidence is both cases." (R. 197)

This statement shows the true situation concerning the jurisdictional question, except that the statement is incorrect in that there was no stipulation in the present case. In the Bronson case the stipulation was entered into for a trial to the court at the time is was assigned for trial. In the present case there was no such stipulation. The Bronson case was a companion case before the same judge. Hence plaintiff's demand for a trial by jury of all issues triable by jury (R. 30).

It is likewise fundamental that the parties could not in any event stipulate jurisdiction as to the United States and that any order or judgment as to the United States was a nullity for lack of jurisdiction even if the stipulation had actually intended to confer jurisdiction on the District Court. Plaintiff never waived his demand for jury trial nor has he ever changed his theory.

against the government. Although the Collector and the United States were both named as defendants, the only question being whether plaintiff had the right to trial by jury. If so his entire claim was determined by the jury verdict.

The court then could have no basis on which to require an appeal from the favorable judgment against the collector as distinguished from the unfavorable judgment against the United States.

It was only the unfavorable judgment which was erroneous; there was no need under this or any other theory to appeal from a correct and favorable judgment, indeed it would have been improper so to do.

If plaintiff's claim was one cause of action, no judgment could have been appealed from until plaintiff's entire cause was disposed of. (Civil Rules of Procedure, Rule 54(B)). There would be no final judgment from which an appeal could be taken, since the second judgment was a nullity, being void for lack of jurisdiction.

If plaintiff had only one cause of action, parts of which was erroneously entered without jurisdiction, it is the court's and not plaintiff's act, where

the error was called to the court's attention prior to entry of the void judgment.

The facts having been determined, plaintiff is entitled to a correct judgment against the sole responsible defendant.

CONCLUSION

We note that the government contends that plaintiff should be permanently precluded from a determination as to the major portion of his claim.

They state on page 10 of their brief that plaintiff should have appealed from his favorable judgment. The time, however, having expired for this action, this plaintiff would be precluded from that course.

Thus, the government's theory is that while the proper parties were before the court and the facts are undisputed, the plaintiff is barred from ever having a determination of $18,111.37 of his claim.

We do not believe his is due process nor do we believe this is the usual course of judicial procedure.

We resolutely state it would not be justice.

The government infers on page 12 of their brief that collector Earle would not be liable for the $18,111.37 of plaintiff's claim even if the cause were reversed (although the appellate courts infers to the contrary) basing their contention on the fact that the application by the collector of $18,111.37 under direction of the commissioner does not subject the collector to personal liability.

They cite *Lowe Bros. Co. v. United States,* 304 U. S. 302 in support thereof.

In the government answering brief on appeal the cases was discussed by them in direct opposition to their present contention as follows: (p. 44 Appellee's brief).

> *"And this brings us to a consideration of Section 3-772 (e) referred to in footnote 4, supra, as also in the footnote on page 23 of the taxpayer's brief."*
>
> *Section 3772 (e) was added to the code by Section 9 (b) of the act of August 27, 1949, c 517, 63 Stat 666, known as the Tax administration Act of 1949. It provides that:*
>
> *(E) Credit treated as overpayment — The credit of an overpayment of any tax in satisfaction of any tax liability shall for the purpose of any suit for refund of such tax liability so satisfied, be deemed a payment in respect*

of such tax liability to the collector in office at the time such credit is allowed.

The committee reports do not adequately explain the reason for the amendment. It seems clear, however, that thereby the jurisdiction of the District Courts against collectors in office has been enlarged in a case where a credit of an overpayment of any tax has been made by the commissioner against another tax, whether for the same or another year.

Thus the doctrine of Lowe Bros. Co. vs. United States, supra, is no longer applicable in that situation. A suit for the recovery of an overpayment, which has been credited against another tax, may now be maintained against the collector in office at the time the collection is made, under this statute, even though it is not maintainable against him at common law."

The government's theory on the appeal was that even though the statute was applicable, that there was no overpayment (p. 52 of appellee's brief).

We cited to the appellate court and cite here again Section 3770 (c):

"An amount paid as a tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid."

The government then discussed the various holdings of various courts as to the effect of this section as follows:

"This amendment of the code was made necessary because the withholding provisions of the act required payment of substantially the entire tax before assessment. The committee reports explains that the interest cases (cited later by the Supreme Court in the Rosemank case) were not affected thereby. See S. Rep. No. 221, 78th Cong., 1st Sess., p. 34 (1943 Ann. Bull 1314, 133901340), 11 Conference Rep. No. 510, 78th Cong., 1st Sess., 448 (1943 Cum. Ball 1551, 1366).

"In the Rosemann case the Supreme Court said (p. 663) that it need not consider the effect of this amendment.

"Since then, various views have been taken by the lower federal courts of its effect. The District Court of the Southern District of Californai has twice held that it was merely declatory of existing law Murphy vs. United States, 78 F. Supp. 234, 240 and Mitchell v. Westover, 90 F. Supp. 278, 279. Moreover, the District Court of the Southern District of New York has likewise so held on the authority of the Murphy case, supra. Manee vs. United States, 97 F. Supp. 993, 995. See also United States vs. Goldstein, 189 F. 2nd 952, 755 (C A. 1). On the other hand the court of claims has taken the view that the amendment demonstrates the correctiveness of its views in the Rosemann case (citing) see Hanley vs. United States, 73 F. Supp. 80 (C. Cls.) and Reading Co. vs United States, 98 F. Supp. 598, 600 (C. Cls.)."

From the above it would seem under any theory that section 3772 (e) provides that a collector who

is in office when the overpayment is credited can be sued as though he had physically collected the money, and section 3770 (c) provides that there may be an over-payment even though there was no tax liability existent when the money was paid.

We see no reason to put strained or artifical construction on these sections. The intent seems obvious and the government admits the doctrine of *Lowe Bros. Co. vs. United States* is no longer applicable in their brief on appeal, yet in their opposition brief filed here (p. 12) they infer to the contrary in an apparent attempt to justify their present position.

Plaintiff submits that the writ should issue on the grounds:

1. That the lower courts have so far departed from the usual course of judicial process as to call for this court's powers of supervision.

2. That the appellate court has failed to follow the mandate of this court in the case of *Moore Ice Cream Co. v. Rose,* (supra).

3. That there is a conflict in the decisions between the 9th Circuit Court and the 2nd Circuit in

that the 2nd Circuit has held that a judgment is not final for appeal purposes until the whole of the matter is determined, while the 9th Circuit has held in this case that although only $6253.81 of plaintiff's entire claim has been determined, it was a final judgment from which plaintiff was required to appeal, failing which, he is without remedy.

The two cases

Clark vs. Taylor, 163 F. 2d 940;
Roles vs. Earle, 195 F. 2d 346.

4. That the Circuit Court of appeals for the Ninth Circuit has decided an important question of Federal law which has not been but should be, settled by this court, by construing Section 3772 (e), 63 Stat. 666 to mean that a suit against a collector may be maintained even though it has not physically collected the tax money but merely applied a credit.

Note — it does not appear to petitioner that this construction was necessary to the appellate court, determination of this case, but since the question was raised in the appellate briefs and in this matter, by the government, this ground is added.

It does appear that the 9th Circuit has inferentially determined this matter, however, by its discussion and determination of the lack of jurisdiction over the United States, otherwise the jurisdictional question would have been unimportant.

The 9th Circuit was apparently unsure of its position when it states in its opinion:

> *"However because of the apparent confusion in the record, we deem it advisable to decide for ourselves the jurisdictional question which is before this court by reason of the appeal from the March 26, 1951 judgment."*

Thus it appears that if the 9th Circuit had not taken the position that it was necessary to have appealed from the January Judgment, it would have allowed the additional claim for $18,111.37.

In this conclusion the government now in this brief disagrees (although they apparently contended to the contrary on appeal).

The interpretation in the District Court has not been uniform, and should be settled by this court.

This determination is important to settle the practice as to the selection of the proper defendant in all tax matters affecting application of credits

to tax liability and questions as to the running of interest.

Although the matter is not directly determined in this case it will undoubtedly be necessary to a final determination.

Note: (R 64-70) was agreeably deleted in the Circuit Court Record. Its inclusion was erroneous by the certifying clerk.

Respectfully submitted,

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